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HEARING DATE: February 18, 2003, at 10 AM

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

CHAPTER 11

CEDAR CHEMICAL CORPORATION, and
VICKSBURG CHEMICAL COMPANY,

Case No. 02-11039 (SMB)
Case No. 02-11040 (SMB)

Debtors.

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**OBJECTION OF THE UNITED STATES OF AMERICA
TO MOTION BY THE DEBTORS SEEKING, INTER ALIA,
AUTHORIZATION TO SELL CERTAIN ASSETS FREE AND CLEAR OF LIENS AND
CLAIMS TO WESTRADE USA, INC., OR TO ANY BIDDER SUBMITTING A HIGHER
OR BETTER OFFER PURSUANT TO THE TERMS OF A PURCHASE AGREEMENT,
AND RELATED RELIEF**

1. The United States, on behalf of the Environmental Protection Agency ("EPA"), by its attorney James B. Comey, United States Attorney for the Southern District of New York (the "Government"), respectfully objects to the Motion by the Debtors (i) authorizing the Debtor to sell certain assets free and clear of liens and claims to Westrade USA, Inc. ("Westrade") or to any bidder submitting a higher or better offer pursuant to the terms of a purchase agreement; (ii) authorizing the Debtors to assume and assign certain executory contracts to Westrade and to reject certain executory contracts; (iii) approving a break-up fee and bidding procedures; (iv) fixing manner and extent of notice of sale hearing; (v) authorizing the exemption of the sale from the provisions of

Bankruptcy Rules 6004(g) and 6006(d), and (vi) granting related relief (the “Westrade Motion”).

2. The Government objects to the Westrade Motion to the extent that it purports to provide for a sale in which any potential environmental liability to the United States of RiceCo, a nondebtor, would be extinguished. As Debtors’ application to absolve RiceCo of any potential environmental liability is not properly before this Court, and is in every respect meritless, Debtors cannot use the sale of RiceCo to Westrade as a vehicle for eliminating RiceCo’s potential environmental liability, as the Purchase Agreement purports to do. Unless the Debtors actually intend to use the expedited sale procedures to moot the question of RiceCo’s potential environmental liability before it is fully litigated, in which case the present application is improper, the present Motion should be denied and the sale of RiceCo should be delayed until Debtors withdraw, with prejudice, their motion to absolve RiceCo of potential environmental liability as against the United States, and the provisions of the Purchase Agreement that purport to eliminate RiceCo’s potential environmental liabilities are stricken.

BACKGROUND

A. The Parties

3. On March 8, 2002, the Debtors commenced these Chapter 11 cases by filing voluntary petitions for relief under 11 U.S.C. § 101 et seq. (the “Code”).

4. The Debtors continue to manage their properties and to operate their business as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

5. This Objection is respectfully submitted on behalf of the Environmental Protection Agency (“EPA”), an agency of the United States.

B. The RiceCo Absolution Motion

6. On February 7, 2003, Debtors filed a motion seeking an order, pursuant to § 105 of

the Code, declaring that RiceCo is not liable for environmental cleanup, and applying the automatic stay to prevent the Arkansas Department of Environmental Quality (“ADEQ”) from taking any action against RiceCo with respect to its liability for cleanup of the Cedar Site (the “RiceCo Absolution Motion”). RiceCo is not a debtor in bankruptcy. Debtors alleged that they had received a letter from ADEQ on or about November 20, 2002, notifying RiceCo that it was a potentially responsible party (“PRP”) under Arkansas Code § 8-7-512 (the “ADEQ Letter”). (RiceCo Absolution Motion ¶ 8.)

7. Debtors further allege that as a result of the ADEQ Letter, there is a “chilling effect” on Debtors’ efforts to sell their interest in RiceCo (*id.*), and that the prospective buyer “is threatening to walk away if the ADEQ’s claim against RiceCo is not resolved immediately.” (*Id.* ¶ 10.) Debtors allege, however, that they were “unable at this time to disclose either the identity of the prospective buyer or the exact purchase price.” (*Id.* ¶ 6.)

8. Although the RiceCo Absolution Motion specifically concerns a claim by ADEQ that RiceCo is a potentially responsible party, Debtors maintain that the standard of liability under Arkansas environmental law is the same as the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* (“CERCLA”) (RiceCo Absolution Motion ¶ 8.) The EPA has not taken any position with respect to RiceCo’s potential liability under CERCLA or any other statute, but objects to any effort by Debtors to obtain declaratory relief as to the environmental liability of a nondebtor as against the United States or any of its agencies, including the EPA.

C. The Westrade Motion

9. On February 10, 2003, the next business day after filing a motion stating that it was “unable” to disclose the identity of the prospective buyer or the purchase price (RiceCo Absolution

Motion ¶ 6), Debtors filed the Westrade Motion, which discloses that the prospective buyer is Westrade and that the purchase price is \$5.5 million.¹

10. The Westrade Motion notes that Westrade's obligation to close

is conditioned upon either the Bankruptcy Court entering an order finding that RiceCo is not a potentially responsible party (a "PRP") in connection with environmental claims by the Arkansas Department of Environmental Quality ("ADEQ") relating to Cedar or its property, or the ADEQ's release of, and agreement not to pursue, its claim that RiceCo is such a PRP. Cedar recently made a motion to the Bankruptcy Court seeking such relief, which motion is returnable on February 27, 2003. That motion is incorporated herein by reference.

(Westrade Motion ¶ 12) (emphasis added). This condition is also stated in the Purchase Agreement, which provides:

Purchaser's obligation to close under this Agreement is conditioned upon either (i) the Bankruptcy Court entering a final order finding that RiceCo is not a potentially responsible party (a "PRP") in connection with environmental claims by the Arkansas Department of Environmental Quality ("ADEQ") relating [to] the Seller or Seller's property, or (ii) the ADEQ's release of, and agreement not to pursue, its claim that RiceCo is a PRP.

(Westrade Motion Exh. B, ¶ 5(d).)

11. The Westrade Motion further seeks to specify the terms and conditions for competing offers, to establish bidding procedures, to approve a Break-Up Fee, to approve the manner and extent of notice of the Approval Hearing, which would be scheduled for March 6, 2003, and related relief. The Government takes no position on these aspects of the Motion.

¹ Debtors do not provide an explanation as to why the information deemed confidential on Friday, February 7, 2003, was no longer confidential on Monday, February 10, 2003, particularly where the Purchase Agreement itself was signed on February 5, 2003, before either Motion was made.

ARGUMENT

A. The Proposed Sale Cannot Proceed on the Basis of the Assumption That RiceCo's Environmental Liabilities Will Be Resolved, Much Less Extinguished

12. The EPA objects to the Westrade Motion to the extent that it purports to resolve or extinguish RiceCo's potential environmental liability as against the United States. The EPA raises this objection to place all parties on notice that the question of RiceCo's potential environmental liability to the United States cannot be resolved by this Court (or by any court, at this juncture), and that any sale of Debtors' interest in RiceCo cannot provide any guarantees as to the extent of RiceCo's potential environmental liability.

13. The present motion states that the RiceCo Absolution Motion is "incorporated by reference." (Westrade Motion ¶ 12.) It is not clear what this is supposed to mean. Such "incorporation" could well mean that the Debtors are seeking to obtain Court approval of a sale on the condition that no environmental liability attaches to the asset before actually litigating the question of environmental liability. The Approval Hearing is scheduled for March 6, 2003. While the return date of the RiceCo Absolution Motion is the week before, February 27, 2003, there is no guarantee that the issue will be resolved at that time, and it is abundantly clear that there would be insufficient time for any party to obtain review of this Court's decision should there be an appeal from any decision rendered on February 27, 2003.² If the RiceCo Absolution Motion is not decided by March 6, 2003, or if an appeal cannot be timely heard, the question of whether RiceCo faces any potential environmental liability would then be mooted by the sale itself.

² For this reason, the Government objects to ¶ 5(d) of the Purchase Agreement, and ¶ 12 of the Westrade Motion, which would treat the matter as resolved upon entry of an order by the Bankruptcy Court, leaving no time for review by the district court or the Second Circuit.

14. To avoid such gamesmanship, paragraph 5(d) of the Purchase Agreement should be stricken, and the RiceCo Absolution Motion be withdrawn with prejudice or denied by this Court, or the sale should be delayed until the expiration of any time to appeal from any order purporting to absolve RiceCo of any environmental liability to the United States. Alternatively, Debtors can simply obtain the waiver they seek from ADEQ. Whatever waiver Debtors, RiceCo, or Westrade obtain from ADEQ, however, should have no bearing on any potential environmental liability under CERCLA or any other environmental statute in an action brought by the United States. However, the Debtor has cast its net for relief to non-debtor RiceCo very widely, seeking relief from general cleanup liability. Further, as the Debtor has alluded in the RiceCo Absolution Motion, a finding of liability under the Arkansas statutory provisions in contention here would involve essentially the same issues of fact as a finding under CERCLA.

B. The RiceCo Absolution Motion Is Meritless

15. The Government intends to file a timely objection to the RiceCo Absolution Motion in the ordinary course. Because the Government's objections to the RiceCo Absolution Motion form the basis of its objections to the Westrade Motion, however, the Government will set forth its objections in brief below, without waiving any other objection it may raise in the course of responding to the RiceCo Absolution Motion.

16. First, the RiceCo Absolution Motion asks the Court to rule upon a purely hypothetical question, and therefore does not present a "case or controversy" amenable to judicial resolution. The Second Circuit has squarely ruled that the receipt of a letter from an environmental authority advising a party that it may be a PRP does not present a "case or controversy" suited for judicial resolution. See Carter Day Indus., Inc. v. U.S. Environmental Protection Agency (In re Carter Day Indus.), 838 F.2d 35 (2d Cir. 1988). As the Second Circuit noted, "[t]he PRP letter is not a final,

definitive ruling with the status of a law demanding immediate compliance since it does not impose any liability upon” the debtor. Id. at 38. The dispute over the assertion of PRP liability was therefore not ripe for adjudication. See id. The Second Circuit also noted that requiring the environmental authorities to litigate liability simply because a PRP letter has been issued would impose significant burdens upon the Government: “If the EPA is forced to expend its resources on preserving its rights to eventual recovery against any PRP that has recently emerged from bankruptcy, the EPA will have less ability to pursue its primary mission of cleaning the sites.” Id. at 40. The RiceCo Absolution Motion, therefore, does not present an issue ripe for adjudication.

17. Second, the RiceCo Absolution Motion is meritless because RiceCo is not a debtor. The Code confers no authority upon the bankruptcy court to discharge nondebtors. Section 524(e) of the Code provides that the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” 11 U.S.C. § 524(e). While there is a circuit split over whether it is ever proper to enjoin collection efforts against third parties, compare In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995) (“This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.”), with SEC v. Drexel Burnham Lambert, 960 F.2d 285, 293 (2d Cir. 1992) (permitting injunctive relief in limited circumstances), those cases permitting such relief do so only where “the injunction plays an important part in the debtor's reorganization plan.” Drexel Burnham, 960 F.2d at 293. In this case, by contrast, there will be no plan of reorganization, and consequently no justification for such relief.

18. Third, federal environmental law plainly precludes preenforcement judicial review. See 42 U.S.C. § 9613(h); Carter Day, 838 F.2d at 37 (citing § 9613(h)). Moreover, section 113(b) of CERCLA establishes exclusive jurisdiction over all controversies arising under it in the federal

district courts. See 42 U.S.C. § 9613(b). Even if this case presented a ripe controversy concerning a debtor, as opposed to a speculative controversy involving a nondebtor, the plain terms of CERCLA impose a separate jurisdictional bar to the RiceCo Absolution Motion.

19. Finally, Debtors' argument that the ADEQ Letter somehow violated the automatic stay is frivolous. Section 362(b)(4) of the Code specifies that the automatic stay which generally precludes "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor" does not apply to "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power . . . other than [the enforcement of] a money judgment." 11 U.S.C. § 362(a), 362(b)(4). Enforcement of environmental laws enacted to protect public health and safety is a classic exercise of police and regulatory authority. Indeed, "[n]o more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined." Penn Terra Ltd. v. Department of Environmental Resources, Commonwealth of Pennsylvania, 733 F.2d 267, 274 (3d Cir. 1984). Not only was the ADEQ Letter sent to a nondebtor, but the Second Circuit has squarely ruled that actions to enforce environmental laws fall within the police or regulatory power exception to the automatic stay. See City of New York v. Exxon Corp., 932 F.2d 1020, 1024-25 (2d Cir. 1991) ("We therefore hold that governmental actions under CERCLA to recover costs expended in response to completed environmental violations are not stayed by the violator's filing for bankruptcy."). Debtors' accusation that the ADEQ Letter violated the automatic stay is meritless.

CONCLUSION

For the reasons stated above, the Westrade Motion should be denied and the sale of RiceCo should be delayed until Debtors withdraw, with prejudice, their motion to absolve RiceCo of potential environmental liability to the United States, or the Court denies such motion, and the provisions of the Purchase Agreement that purport to eliminate RiceCo's potential environmental liabilities to the United States are stricken or withdrawn.

Dated: New York, New York
February 14, 2003

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